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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER STEVEN BUTLER, Defendant and Appellant.	D041819 (Super. Ct. No. SCN128327)

APPEAL from a judgment of the Superior Court of San Diego County, Joan P. Weber, Judge. Affirmed in part; reversed in part and remanded.

The prosecution evidence showed that after plotting to steal money from a Bank of America branch in Vista, California, defendant Christopher Steven Butler and two other men invaded the home of the bank's manager, Michelle Ramskill-Estey (Estey), and held her and her seven-year-old daughter, B. and an adult roommate, Kimbra Oliver, at gunpoint overnight. In the morning, Butler taped what appeared to be dynamite to the hostages' backs and threatened them with death if Estey did not cooperate. He forced

Estey to drive to the bank and take cash from the vault. Butler testified in his defense that he and Estey were having an affair and she instigated the robbery because of financial problems.

A jury convicted Butler of conspiracy to commit kidnapping for robbery (Estey) (Pen. Code, §§ 182, subd. (a)(1),[1]209, subd. (b)(1)), two counts of kidnapping for ransom (B. and Oliver) (§ 209, subd. (a)), and first degree robbery (Oliver) (§§ 211, 213, subd. (a)(1)(A)). The jury deadlocked on counts of kidnapping for robbery (Estey) (§ 209, subd. (b)(1)), first degree robbery (Estey) (§ 211), robbery (Estey) (§ 211) and residential burglary (§ 459). The court declared a mistrial as to those counts. Butler pleaded guilty to two counts of robbery (§ 211) arising from incidents unrelated to the Bank of America incident.[2]

The court found true allegations that Butler personally used a firearm (§ 12022.53, subd. (b)), the property loss exceeded $150,000 (§ 12022.6, subd. (a)(2)) and he was previously convicted in federal court of bank robbery and the conviction qualifies as a strike under California's three strikes law. The trial court sentenced Butler to three consecutive life terms plus 64 years.

On appeal, Butler contends the court erred by not instructing the jury that specific intent to commit the elements of kidnapping for robbery is an element of the conspiracy count. He asserts the error was prejudicial because three jurors voted to acquit him on

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1 Statutory citations are to the Penal Code unless otherwise specified.

the four other counts related to Estey, presumably because they were swayed by his testimony, and it is reasonably probable that absent the erroneous instruction the jury would have also deadlocked on the count of conspiracy to commit kidnapping for robbery. Although we find Butler's testimony implausible, and agree with the trial court that it further victimized Estey, we must reverse the conviction on that count for prejudicial instructional error.

We reject Butler's additional contention the court denied him a fair trial and abused its discretion by requiring that he wear an electric stun belt in court. Butler waived appellate review of the issue by not raising it at the trial court, and in any event, he suffered no prejudice.

Further, in light of the Supreme Court's recent decision in *Blakely v. Washington* (2004) __U.S.__ [124 S.Ct. 2531] (*Blakely*), we conclude the court's selection of the upper term on the first degree robbery conviction, based on aggravating factors not decided by a jury or admitted by Butler, violated Butler's Sixth Amendment right to a jury trial. We affirm the judgment in part, and reverse it in part and remand.

FACTS

The prosecution evidence showed as follows.

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2 Butler was charged with the armed robberies of employees of a Denny's restaurant in October 2000 and a Blockbuster video store in November 2000.

The Planning Stage

Butler and his girlfriend Lisa Ramirez lived in a room at George Calloway's house in Oceanside, California, and Christopher Huggins lived in Calloway's garage. Huggins's friend Robert Ortiz lived across the street from Calloway's house.

On November 7, 2000, Ramirez, identifying herself as Lisa Butler, went to the Bank of America and asked employee Loretta Myers about opening a business account. Ramirez reported that she and her husband recently moved to the area and planned to open a photography business with a $1.2 million lawsuit settlement he expected to receive soon. Myers spoke with Ramirez for about an hour, and Myers's desk was about eight feet from the desk of the bank's manager, Estey.

Butler told Calloway he was "planning on robbing something" and "planning on staking out a bank." Butler said he planned to go to a bank, watch the bank manager for a couple of days and "stake out the house." Butler also said "he would never have to go in the bank, . . . his plan was to put a bomb on the lady, and she'd go in the bank . . . [and] go in and bring the money out." Butler planned to "threaten[] her with her children." Butler purchased two-way radios, and he, Ramirez and Huggins began testing their range. Further, Butler sawed off pieces of a broom handle, spray painted them red to resemble dynamite and attached wires to them. He told Calloway he planned to use the two-way radios and the fake dynamite in the bank robbery. He also told Calloway he believed Ortiz could provide some guns.

On November 20, 2000, Butler, Ramirez, Huggins and Ortiz went to the apartment of Cassandra Stokes, a friend of Ramirez's and a former co-worker of Huggins. The

apartment is a short distance from the Bank of America. Butler, Ramirez, Huggins and Ortiz left the apartment that evening, but they came back later and Ramirez reported, "It didn't go right." Butler and Ramirez carried two-way radios.

On November 21, Ramirez returned to the Bank of America to open a business account. She gave Myers a business card containing Butler's name and the name of a photography business and showed her a portfolio of photographs. Myers told Ramirez that Butler would have to sign a signature card, and he came to the bank later that day to do so. He appeared "startled and nervous," and he "was looking all around the teller area." While he waited for Myers to finish with a customer, Butler sat at Estey's desk and spoke with her. He also gave Estey a business card. Butler asked Myers whether the bank had ever been robbed.

That afternoon Butler told Calloway he and Ramirez "were going to stake out the house." Butler, Ramirez, Huggins and Ortiz spent several hours at Stokes's apartment before leaving at approximately 7:30 p.m. Ortiz had his girlfriend's Rottweiler dog with him.

The Kidnappings

After picking up her daughter, Estey arrived home about 7:00 p.m. on November 21. They lived in a remote area and a Rottweiler that Estey had not seen before was in her yard.

Estey and her daughter were curled up on the couch when three men wearing black masks, hooded jackets and gloves smashed through the locked back door and

rushed inside. Estey eventually recognized one of the men as Butler because his eyes were "weepy and red." Huggins and Ortiz were later identified as the other two men.

Two of the men pointed their guns at Estey, who begged them not to hurt her daughter. Huggins grabbed Estey by the back of the head and slammed her onto the floor. The men tied Estey's and B.'s hands behind their backs with duct tape, and also taped B.'s ankles together. B. shook with fear and asked the men whether they were going "to kill my mommy."

Butler did most of the talking. He told Estey "they had tracked" her for several weeks and "they were there to get the money from the vault of the bank." Butler questioned Estey about bank procedures and threatened to kill her and B. if she did not cooperate. Butler warned Estey that if she "pull[ed] anything" other people outside would kill them and she would have to watch her daughter die first. Butler showed Estey the fake dynamite and a supposed detonating device that resembled a doorbell, and said, "We're going to put this on you in the morning." Ortiz pointed a gun at Estey and told her not to move or speak. Estey heard Butler speaking with a woman outside the house by two-way radio, and the woman referred to him as "Chris." Estey thought she recognized the woman's voice as Ramirez's.

Oliver arrived home about 11:00 p.m., and when she entered the front door Huggins grabbed her from behind and placed a hand over her mouth. Oliver screamed at the men to get out of the house, and Butler "took his gun and stuck it right up her nose." When Estey pushed Butler's hand away from Oliver, he threatened to blow Estey's head off. Huggins and Ortiz threw Oliver to the floor and taped her hands and ankles. Ortiz

let the Rottweiler in the house and told Estey and Oliver the dog was trained to kill and would kill them if they made any sudden moves or tried to escape.

The men remained in Estey's home all night. In the morning, Butler ordered her to get ready for work, and to wear loose clothing and a jacket. The men taped the fake dynamite to the backs of Estey, B. and Oliver and displayed a supposed detonator device with a "10-mile radius." Butler warned the hostages: "Do not go outside the house. If you try to run, you will disintegrate. If you try any funny business, you will all be killed." The men took Oliver into her bedroom, which they had ransacked, and having untaped her earlier, taped her hands behind her back, her feet together and her eyes and mouth shut. The men put B. in a closet and taped her legs together and her mouth.

In B.'s presence, Butler told Estey, "you have about 10 minutes to say whatever it is you'd want to say to your daughter, because it might be the last thing you ever say to her if you screw up." Butler handed Estey her briefcase and told her to put the money from the bank in a gym bag inside the briefcase, and not to include any "funny money" or "any of that stuff that explodes." Holding his gun and a two-way radio, Butler told Estey it was "time to go to work." Butler ordered Estey to drive to the bank in her Jeep with him crouched in the back seat.

The Robbery and Aftermath

Estey parked in the Bank of America lot shortly after Myers and another employee, Janet Becerril, arrived for work around 8:30 a.m. Butler told Estey, "You've got five minutes from the time that truck leaves that brings the money to get out of that

bank and get back in the car." Butler told Estey not to make any telephone calls and warned her, "We can see what you're doing and hear everything that goes on in the bank."

The bank was not yet open for business, and Estey entered it by using her keys. Estey was usually "bubbly" and "very vivacious," but she ignored Myers. The Brinks truck arrived and a guard delivered cash to the vault. Estey then took her briefcase into the vault, where she pulled the gym bag out and began stuffing cash into it. She told Becerril, who was also in the vault, about the hostage situation and that B.'s and Kim's lives were in danger. Estey showed Becerril the "dynamite" and insisted that she not notify authorities until Estey gave her okay. Estey left the bank, telling Myers she would telephone later. Becerril then told Myers what happened, and Myers called the police.

Estey returned to her Jeep with the cash,[3] and Butler directed her to drive to a cul-de-sac near Stokes's apartment. Butler told her to get out of the car and slowly walk to another location where he would leave the Jeep. Estey followed his directions, found the Jeep and drove home. Huggins and Ortiz had left in Oliver's car, and before leaving they removed the fake dynamite from B. and Oliver. Estey cut the tape off B. and Oliver, and Oliver removed the fake dynamite from Estey's back and put it outside on a retaining wall. She, Estey and B. then ran to a neighbor's house and asked him to call 911. Estey telephoned Myers and explained what happened and told her Butler was one of the men involved. Later that day Estey talked to another bank employee and asked her to tell the police of Butler's involvement and ask them to check her desk for his business card.

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3 The amount taken from the bank was $360,000.

The afternoon of November 22, Butler and Ramirez went to Stokes's apartment and left $10,000 in cash under her pillow. That evening, they took a locked safe to Stokes's apartment and asked her to hide it. Ramirez told Stokes the safe contained $100,000 and two-way radios. According to Stokes, she got a friend to take the safe and she never saw it again.

On November 23 Butler bought six round trip plane tickets for that day to Atlanta, Georgia, for $2,000 in cash, for himself, Ramirez, her children and another person. On November 29 Butler and Ramirez returned to California, and on December 1 police arrested them as they drove away from the vicinity of Stokes's apartment in Ramirez's car. In the car were Bank of America documents with account numbers and Myers's name written on them; a two-way radio; black gloves; a wool cap with the eyes cut out; black nylon pants; a detached doorbell; a gym bag containing the type of nylon straps banks use to bundle cash; a card on which "Bank of America," "November 20," "$20,000" and a teller's number were stamped; four credit cards in Oliver's name; and three credit cards in Estey's name. In Stokes's apartment police found spears, binoculars and a camera. Oliver identified the mask, gloves and nylon pants as clothes Butler wore and the binoculars and camera as items taken from her bedroom.

At Calloway's house police found a black knit cap with eye holes cut out, gloves, a revolver, pieces of wood dowel and cans of red spray paint containing Butler's fingerprints. The composition of the paint matched the paint on the fake dynamite. The fake dynamite taped to Estey contained Butler's fingerprint in the red paint.

B. told investigators that three masked men broke into her house, and she demonstrated where the fake dynamite was taped to her back. Additionally, investigators found pieces of duct tape throughout Estey's house, some of which had Oliver's hair attached to it.

In December 2000 Huggins' girlfriend notified the FBI she found a safe on the side of her house. It contained $93,100, which was returned to Bank of America. In February 2001 Ortiz was arrested in Wisconsin. FBI agents found a safe in his residence that contained $32,855. That cash was also returned to Bank of America.

The Defense Case

Butler testified in his defense as follows. He met Estey in August or September 2000 when she struck up a conversation as they were leaving a grocery store. Butler told Estey he had been convicted of bank robbery. She "was kind of shocked," and laughingly said, "well, only if you knew what I do."

Butler met Oliver in September 2000 when she accompanied him and Estey to the Oceanside pier. He took photographs of Oliver and Estey together and Oliver took photographs of him and Estey together.

Butler was starting up a business photographing nightclub patrons, and Estey was able to help him expand the business to a new nightclub called "Club Atlantis" because she knew its owner, Ken Kissinger. Butler hired Estey to work for him at Club Atlantis.

By October Butler and Estey were intimate. Butler told Estey about Ramirez, and Estey thought he "could do so much better" in his business and personal lives and she invited him to join her in a plan to rob the Bank of America. Estey told Butler about "one

lady that got kidnapped at a bank somewhere in L.A., and that was the origination of the plan."

Two keys were required to open the bank vault, and Estey and Butler could not figure out how to persuade one of her co-workers to help her open the vault. Estey told Butler "to think on that part, and [he] took it to . . . Calloway." Calloway "thought of the idea of why don't you walk in there with a [fake] bomb." Estey thought "it was a pretty good idea," so he and Calloway "immediately started working on this fake dynamite." Estey told Butler the contraption did not look like real dynamite, but "it might work on one of her co-workers since they were all females." Butler left the fake dynamite with Estey in October, and he "thought she was really just joking" about robbing the bank. He told her, "I've got my business" so "I don't need to get back into that."

Butler was in the Bank of America on November 21 because Estey telephoned him and said, "your girlfriend didn't have I.D., so you need to come into the bank to sign . . . forms." Butler needed to open a business account and other accounts because his son's mother, who "was a model for a Sports Illustrated swimsuit issue," was murdered by a stalker and "[his] son was going to receive [$]1.8 [million], and the insurance company was going to pay [him] [$]100,000 every three months for up to a year." Butler planned several months in advance to fly to Georgia in late November to attend a hearing regarding custody of his son, and on November 29 he was awarded custody.[4]

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[4] Butler told the probation officer he has two children in Georgia, "a 5-year old son . . . he lost custody of just prior to arrest, and a 2-year-old daughter who he's never seen," and the "children's mother has custody."

Estey invited Butler and Huggins over the evening of November 21, and Ramirez dropped them off at Estey's house. Estey had not met Huggins before, but they were both working for Butler in his photography business and during Butler's upcoming trip to Georgia he planned to leave Estey in control of the business. Huggins "was supposed to keep in contact with [Estey] during the time [he] was gone to actually monitor [his] money." Butler had spears with him because Estey wanted him to take "Amazon-type pictures" of her with the spears in "the brush area" near her home. It was dark when he arrived at her home, but he brought lighting.

Ortiz went to Estey's that evening as Huggins's guest. Estey, Huggins and Ortiz "ended up smoking dope" and everyone but Butler "was high." Estey asked Butler whether he had revealed "the plan" to Huggins and Ortiz, and he said no. Estey and Butler had not discussed robbing the bank since October when he gave her the fake dynamite. Estey told Huggins and Ortiz, "we've got a big money scheme," which roused their interest. Oliver got home and everyone but Butler smoked more marijuana. The bank robbery plan was discussed again, and Oliver said Estey was "just talking out of the side of her face" and no one took her seriously. Butler "didn't think [Estey] had the guts" to rob the bank.

However, the situation later got serious when Estey "said that we had to make her house looked ransacked in order to get the police to believe it." Estey messed up her bedroom. Butler took two of her cameras and other items and Estey gave him credit cards "[s]he said . . . weren't worth anything." Oliver told Huggins to take her video camera because his son's birthday party was approaching and he wanted to videotape it.

Also, at Oliver's suggestion Butler kicked in the back door of the house to make it look like a forced entry.

The following morning Estey "set out to prove to more or less Huggins and Ortiz that she was . . . with the program, she was going to do what she said she was going to do." She told Butler she had a discussion with Oliver about him taking her car, but Oliver objected and "was basically totally against the whole thing." Oliver was preparing to take Butler, Huggins and Ortiz home when Estey "came out of her room with [the fake dynamite] on her back [and] asked [Butler] to help her adjust it to make it look like it was real."

Before driving alone to the bank to rob it, Estey told Butler, Huggins and Ortiz to leave in Oliver's car because the police would arrive at her house later. The men left, but they were back at Estey's house when she returned from the bank with the money. Of the $360,000 taken from the bank, Estey kept only $60,000. She gave Butler $100,000, and she also gave Huggins and Ortiz each $100,000, although she just met them the previous night, because "they were last minute involves [*sic*], and they weren't even supposed to be part of that plan," but Estey "opened her mouth to them." Also, Butler "wasn't going to let this go down in front of [Huggins] with all this money and not give him a part of it."

Butler denied wearing a disguise, taping anyone up, or that there was any hostage situation. Wads of duct tape investigators found throughout Estey's house, some of which had Oliver's hair on it, had to have been placed there by Estey or Oliver after he left Estey's home the morning of the robbery. Butler had no idea how Estey got her

daughter "to go along with the story . . . when she [was] interviewed by the police," but he offered that "your child is going to do what you tell them to do."

Butler presented no evidence to corroborate his story other than Estey's admission she had financial problems. For instance, Butler produced no pictures he supposedly took of Estey, no documentation regarding a custody hearing for his son in Georgia and no business records showing he employed Estey in his photography business or even had a photography business, and he presented no witness who had ever even seen him and Estey together before the robbery. Estey and Oliver denied his story.[5]

DISCUSSION

I

Conspiracy Instruction

"The trial court must instruct even without request on the general principles of law relevant to and governing the case. [Citation.] That obligation includes instructions on all of the elements of a charged offense." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.)

CALJIC No. 6.10 provides in part:

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5 Butler, Ramirez, Huggins and Ortiz were all charged with the same counts, although Butler was charged with two additional counts of robbery unrelated to the Bank of America robbery. Butler and Ramirez were tried together, and the jury found her not guilty of all charges. Huggins and Ortiz were tried together and found guilty of all charges, including all charges in which Estey was the alleged victim. Before their trial they confessed to the crimes without mentioning any involvement of Estey, but that fact was not before the jury in Butler's trial. Stokes was charged with being an accessory after the fact and receiving stolen property, and she pleaded guilty to those counts.

> "A conspiracy is an agreement entered into between two or more persons with the specific intent to agree to commit the crime of _____ [[or] _____] *and with the further specific intent to commit that crime* [[or] _____], followed by an overt act committed in this state by one [or more] of the parties for the purpose of accomplishing the object of the agreement. Conspiracy is a crime." (CALJIC No. 6.10 (Jan. 2004 ed., italics added.)

The trial court omitted the italicized language from the instruction, and Butler contends the omission constitutes reversible error.

"Pursuant to section 182, subdivision (a)(1), a conspiracy consists of two or more persons conspiring to commit any crime. A conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to commit an offense, *as well as the specific intent to commit the elements of that offense*, together with proof of the commission of an overt act 'by one or more of the parties to such an agreement' in furtherance of the conspiracy." (*People v. Morante* (1999) 20 Cal.4th 403, 416, fn. omitted, italics added.) Conspiracy "is a dual mental state." (*People v. Iniguez* (2002) 96 Cal.App.4th 75, 78.) It is ordinarily error to omit from CALJIC No. 6.10 the element of specific intent to commit the target crime. (See *People v. Marks* (1988) 45 Cal.3d 1335, 1345; *People v. Miller* (1996) 46 Cal.App.4th 412, 427, disapproved on other grounds in *People v. Cortez* (1998) 18 Cal.4th 1223, 1240.)

The Attorney General contends that considered as a whole the instructions were proper. The " 'correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.' [Citation.] Thus, ' "[t]he absence of an essential element in one instruction

may be supplied by another or cured in light of the instructions as a whole." ' " (*People v. Burnett* (2003) 110 Cal.App.4th 868, 875.)

The Attorney General relies on the court's instruction on the separate count of kidnapping to commit robbery. The court advised the jury an element of that count is the "specific intent to commit [robbery] must be present when the kidnapping commences." However, the instruction did not mention the conspiracy count or suggest the intent to commit the target offense is an element of the conspiracy count. The Attorney General also relies on the court's general instruction that in each of the charged crimes "there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator." That instruction, however, stated the specific intent required is "set forth elsewhere in these instructions," and the element of specific intent to commit the target crime was omitted from the instruction on the conspiracy count. The erroneous omission from CALJIC No. 6.10 was not cured by other instructions.

An instructional error is generally subject to a harmless error standard of review (Cal. Const., art. VI, § 13; *People v. Flood* (1998) 18 Cal.4th 470, 506), and the parties agree that standard applies here. Accordingly, the error merits reversal only if it is reasonably probable the jury would have reached a result more favorable to the defendant absent the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

The Attorney General contends the error was harmless because "other instructions informed the jury that [Butler] was required to have specific intent to commit the kidnapping for robbery," and "the prosecutor, in closing arguments, defined conspiracy to the jury and stated that . . . to convict on count 1 [conspiracy], they had to find that

[Butler] had 'a specific intent to do a crime.' " As discussed, other instructions did not cure the incomplete CALJIC No. 6.10 instruction. Further, counsel's remarks in closing argument did not cure the failure to instruct on an element of the conspiracy offense. As the court explained in *People v. Miller, supra,* 46 Cal.App.4th at page 426, footnote 6: "While we have no trouble utilizing the argument of counsel to help clear up ambiguities in instructions given, there is no authority [that] permits us to use argument as a substitute for instructions that should have been given. Logically, this is so, because the jury is informed that there are three components to the trial—evidence presented by both sides, arguments by the attorneys and instructions on the law given by the judge. Jurors are told their decision must be based on the facts and the law and if counsel says anything that conflicts with the instructions that are given by the judge, they must follow the instructions." (Italics omitted.) Here, the court instructed the jury to disregard "anything concerning the law said by the attorneys in their arguments [that] conflicts with my instructions."

The Attorney General also asserts the instructional error was harmless because substantial evidence was presented that Butler had the specific intent to commit the elements of the crime of kidnapping for robbery. The Attorney General points out that Butler admitted he made the fake dynamite, he possessed two-way radios and was seen practicing with them before the incident, and police found in his possession a black knit cap with the eyes cut out and other materials used during the incident.

Indeed, the evidence of Butler's guilt on all counts is overwhelming. Further, in our view Butler's uncorroborated testimony is incredible and irreconcilable with many

undisputed facts, such as B.'s recounting of the details of the incident to investigators and showing them where the fake dynamite was taped to her back. Further, when police arrested Butler he admitted knowing about the robbery and directed them to Stokes and the friend of hers who reportedly took the safe he and Ramirez left in her apartment. Butler never mentioned any involvement of Estey to law enforcement. During the penalty phase of the trial the court characterized Butler's testimony as an "outrageous pack of lies," and observed that in addition to Estey and her young daughter having to endure "that night of terror," Estey "had to sit through this trial and be victimized again."

Contrary to our assessment of the evidence, however, three jurors voted to acquit Butler of four of the five crimes related to Estey—kidnapping of Estey for robbery, first degree robbery of Estey, robbery of Estey and residential burglary. On the kidnapping count, the court instructed the jury that "[k]idnapping is the unlawful movement by physical force of a person without that person's consent for a substantial distance," and "[r]obbery is the taking of personal property in the possession of another, against the will and from the person or immediate presence of that person, accomplished by means of force or fear." The court also instructed the jury that "[w]hen one consents to accompany another, there is no kidnapping." Further, the court instructed the jury that any person who enters an inhabited dwelling with the specific intent to commit kidnapping for robbery is guilty of the crime of burglary. Presumably, the three jurors finding for Butler on those four counts accepted the defense theory that Estey was a willing participant or found it raised reasonable doubt about Butler's guilt.

The misgivings of some jurors regarding Estey's role is also shown by a note the jury sent the court during deliberations. It stated: "Why is Bank of America never listed as the sole victim of the bank robbery? Can a victim's name and Bank of America be separated into two charges regarding Count 7 [alleged as robbery from the "immmediate presence of [Estey] and Bank of America"]? If they cannot be separated, does one have to believe that both parties are victims in order to vote guilty?" (Original underscoring.)

Outside the jury's presence, the court stated: "[B]asically what they're asking is the same thing all of us asked when we did our jury instruction conference in chambers, which is if [the jurors] don't believe [Estey] is a victim but [they] do believe there was another person who was a victim, which is [Bank of America employee Becerril], because of course robbery requires that the property be taken by force or fear from a person, is that okay?" The court sent the jury a note explaining that "[a]s long as the jury finds that all the elements of the robbery charge have been proved beyond a reasonable doubt, the jury does not have to limit itself to the victims listed on the verdict form, as long as the jury unanimously agrees as to which person was robbed."

Under the circumstances, we cannot say the court's omission from CALJIC No. 6.10 was harmless error. Rather, since the jury deadlocked on the count for kidnapping Estey for robbery and other counts that alleged she was the victim, it is reasonably probable that had the instruction on the conspiracy count included the element of specific intent to commit the elements of kidnapping for robbery the jury would have

deadlocked on that count also.[6] Accordingly, we must reverse Butler's conviction on that count.

II

Electric Stun Belt

The court required Butler, as a security measure, to wear a remote-controlled electric stun belt throughout trial because he had tried to escape from jail.[7] He contends this denied him a fair trial and was an abuse of discretion, since "the requirement was imposed without adequate support in the record."

Butler relies on *Mar, supra,* 28 Cal.4th 1201, decided after trial here, in which the Supreme Court held the principles it enunciated in *People v. Duran* (1976) 16 Cal.3d 282

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6 Although Butler testified he knew Oliver and did not harm her, and she participated in the plan by, for instance, suggesting Butler kick in the back door of Estey's home to make it appear there was a forced entry, the jury unanimously agreed Butler was guilty of kidnapping Oliver for ransom and robbing her. Those convictions seem irreconcilable with the jury's inability to agree on four of the five crimes involving Estey.

7 The record shows Butler wore a Remote Electronically Activated Control Technology (REACT) belt. *People v. Mar* (2002) 28 Cal.4th 1201 (*Mar*), describes the REACT belt as follows: The " 'stun belt . . . consists of a four-inch-wide elastic band, which is worn underneath the prisoner's clothing. This band wraps around the prisoner's waist and is secured by a Velcro fastener. The belt is powered by two 9-volt batteries connected to prongs [that] are attached to the wearer over the left kidney region. . . .' [¶] 'The stun belt will deliver an eight-second, 50,000-volt electric shock if activated by a remote transmitter [that] is controlled by an attending officer. The shock contains enough amperage to immobilize a person temporarily and cause muscular weakness for approximately 30 to 45 minutes. The wearer is generally knocked to the ground by the shock and shakes uncontrollably. Activation may also cause immediate and uncontrolled defecation and urination, and the belt's metal prongs may leave welts on the wearer's skin requiring as long as six months to heal. An electrical jolt of this magnitude causes temporary debilitating pain and may cause some wearers to suffer heartbeat irregularities or seizures. [Citations.]' " (*Id.* at pp. 1214-1215.) Here, the stun belt was never activated.

(*Duran*), regarding the use of physical restraints such as shackles or manacles in the courtroom also apply to the use of stun belts. (*Mar,* at p. 1219.) In *Duran,* the court held physical restraints should not be imposed absent "a showing of a manifest need for such restraints." (*Duran,* at p. 291.) The court also explained in *Duran*: "The showing of nonconforming behavior in support of the court's determination to impose physical restraints must appear as a matter of record, and, except where the defendant engages in threatening or violent conduct in the presence of the jurors, must otherwise be made out of the jury's presence. The imposition of physical restraints in the absence of a record showing . . . violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion." (*Ibid.*) Further, the "imposition of restraints in a proper case is normally a judicial function." (*Id.* at p. 293, fn. 12.)

In extending the principles of *Duran* to stun belts, the court in *Mar* explained that "[e]ven when the jury is not aware that the defendant has been compelled to wear a stun belt, the presence of the stun belt may preoccupy the defendant's thoughts, make it more difficult for the defendant to focus his or her entire attention on the substance of the courtroom proceedings, and affect his or her demeanor before the jury—especially while on the witness stand." (*Mar, supra,* 28 Cal.4th at p. 1219.)

In *Mar*, the defendant objected at the trial court to wearing a stun belt during his testimony. (*Mar, supra,* 28 Cal.4th at pp. 1210-1213, 1220.) Butler, in contrast, raised no objection during trial to the use of a stun belt. He first raised the issue in a new trial motion. "Defendant's failure to object and make a record below waives the claim here." (See *People v. Tuilaepa* (1992) 4 Cal.4th 569, 583.) We reject Butler's assertion he was

excused from objecting at trial under the futility doctrine. The court was open-minded on the issue of security and elicited the opinions of all parties regarding alternative security measures.

Even without waiver Butler's argument fails because he has made no showing of prejudice. As the trial court explained at the hearing on the new trial motion, the stun belt did not preclude Butler from testifying effectively. The court noted that to the contrary, "he smiled, he was very conversational with the jury, he talked at length about all of the details of his alleged relationship with . . . Estey . . . , all the way down to where they had their Chinese food and what her favorite type of Chinese food was. [¶] He engaged the jury. He was as conversational and as low key as any defendant that I have ever seen as a lawyer or a judge. [¶] I don't find any credibility to this man's statements that he was so adversely affected by this belt that he was terrified when he was attempting to communicate with his lawyer and with the jury." Indeed, three jurors were apparently swayed by Butler's testimony, which from the cold record provokes disbelief. Reversal is not warranted on this ground.

III

Blakely Issues

A

During the pendency of this appeal, the United States Supreme Court issued its opinion in *Blakely, supra,* 124 S.Ct. 2531. In *Blakely*, the petitioner pleaded guilty to kidnapping his estranged wife, and the factual admissions in his plea, considered alone, justified a maximum sentence of 53 months. The trial court, however, imposed an

"exceptional" 90-month sentence after determining the petitioner acted with deliberate cruelty, an enumerated ground in a state statute for departing in a domestic violence case from the standard sentencing range. (*Id.* at p. 2534.) Citing *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, the majority in *Blakely* held the "exceptional" sentence violated the petitioner's Sixth Amendment right to a jury trial because the facts on which it was based were neither admitted by the petitioner nor decided by a jury. (*Blakely,* at p. 2538.) In *Apprendi,* the court held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi,* at p. 490.)

In supplemental briefing on *Blakely*, Butler contends the trial court's imposition of the upper term of nine years (doubled to 18 years under three-strikes law) on count 6 for first degree robbery of Oliver (§§ 213, subd. (a)(1)(A), 667, subd. (b)-(i)) violates his right to a jury trial because the deviation from the presumed mid-term of six years (§ 213, subd. (a)(1)(A)) was based on aggravating factors the court found under California's determinate sentencing law. Butler also contends the court violated his right to a jury trial by running the sentences on the three robbery convictions (counts 6, 11 and 12) consecutive to the indeterminate life sentences and to each other.

B

Preliminarily, we dispose of the Attorney General's contention that Butler waived appellate review of these sentencing issues by not objecting at the trial court. The Attorney General relies on *People v. Scott* (1994) 9 Cal.4th 331, in which the court explained: "In order to encourage prompt detection and correction of error, and to reduce

the number of unnecessary appellate claims, reviewing courts have *required* parties to raise certain issues at the time of sentencing. In such cases, lack of a timely and meaningful objection forfeits or waives the claim. [Citations.] These principles are invoked as a matter of policy to ensure the fair and orderly administration of justice." (*Id.* at p. 351.)

We decline to find waiver here, as it is likely an objection at the trial court would have been fruitless. Before *Blakely,* California courts and federal courts consistently held a defendant has no constitutional right to a jury trial regarding the imposition of consecutive sentences. (*People v. Groves* (2003) 107 Cal.App.4th 1227, 1230-1231; *United States v. Harrison* (8th Cir. 2003) 340 F.3d 497, 500; *United States v. Lafayette* (D.C. Cir. 2003) 337 F.3d 1043, 1049-1050; *United States v. Hernandez* (7th Cir. 2003) 330 F.3d 964, 982; *United States v. Davis* (11th Cir. 2003) 329 F.3d 1250, 1254; *United States v. Chorin* (3d Cir. 2003) 322 F.3d 274, 278-279; *United States v. Lott* (10th Cir. 2002) 310 F.3d 1231, 1242-1243; *United States v. White* (2d Cir. 2001) 240 F.3d 127, 136.) Further, the parties have cited no pre-*Blakely* California opinion holding there is a constitutional right to a jury trial in connection with the imposition of an upper term sentence. Moreover, since *Blakely* was decided after Butler's sentencing, we may not say he knowingly and intelligently waived his right to a jury trial. (See *Blakely,* 124 S.Ct. at p. 2541 [noting that "if appropriate waivers are procured" a state may utilize judicial fact finding in its sentencing scheme].)

C

We also are unpersuaded by the Attorney General's contention *Blakely* is inapplicable to California's determinate sentencing law because the upper term provided in a particular penal statute does not exceed the "statutory maximum" authorized for that crime. When a penal statute sets forth three potential prison terms for a particular offense, the court is required to impose the middle term unless it finds, by a preponderance of the evidence, that the circumstances in aggravation outweigh the circumstances in mitigation. (§ 1170, subd. (b); Cal. Rules of Court, rule 4.420(c), (d).) The upper term is the maximum allowable sentence, but it is not necessarily the "maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*," which is the *Blakely* standard. (*Blakely, supra,* 124 S.Ct. at p. 2537.)

Here, Butler's probation report enumerated the following aggravating factors: (1) the crime involved a threat of great bodily harm and other acts showing a high degree of cruelty; (2) Butler used a handgun during the crime; (3) the crime involved the taking of items with significant monetary value; (4) the manner in which the crime was carried out involved planning and sophistication; (5) Butler suffered numerous prior convictions; (6) he served a prior prison sentence; and (7) he was on probation and performing poorly when he committed the crime. The court agreed with the probation report, and in imposing the upper term found the factors in aggravation strongly outweighed the factors in mitigation. The court elaborated that Butler "brutally victimized" Oliver, as well as Estey and B., and his testimony was an "outrageous pack of lies."

In accordance with *Blakely,* the Sixth Amendment requires a jury trial on any fact "the law makes essential to the punishment," other than a defendant's prior conviction. (*Blakely, supra,* 124 S.Ct. at pp. 2537 & fn. 5, 2540.) The Attorney General contends that even if *Blakely* is applicable, any error was harmless because the court may select an upper term based on a single aggravating factor (Cal. Rules of Court, rule 4.420(b); *People v. Osband* (1996) 13 Cal.4th 622, 728), and three of factors the court relied related to Butler's prior conviction. Assuming, without deciding, that a harmless error standard applies, we cannot say the elimination of the other four aggravating factors would not have influenced the outcome. Accordingly, we reverse the sentence on count 6 and remand for resentencing.

D

Butler contends there is a presumption under section 699 in favor of concurrent terms on multiple offenses, and the imposition of consecutive sentences based on facts not decided by a jury runs afoul of *Blakely.* He asserts the court erred by imposing consecutive sentences on his three unrelated robbery convictions (counts 6, 11 and 12).

Blakely, however, involved a conviction on a single count and the opinion does not discuss consecutive sentences. Cases are not authority for issues not considered. (*People v. Jones* (1995) 11 Cal.4th 118, 123, fn. 2.) Further, numerous courts have held that *Apprendi,* on which *Blakely* was based, does not apply to the imposition of consecutive sentences. (*People v. Sykes* (2004) 120 Cal.App.4th 1331, 1344-1345, and cases cited therein.)

Moreover, section 669 does *not* set forth a statutory presumption of concurrent sentences. Rather, it gives the court discretion to impose concurrent or consecutive sentences on the subordinate counts, and further provides that if the court *fails* to specify a sentencing choice, concurrent sentences apply. "While there is a statutory presumption in favor of the middle term as the sentence for an offense [citation], there is no comparable statutory presumption in favor of concurrent rather than consecutive sentences for multiple offenses except where consecutive sentencing is statutorily required." (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923.)

Butler was convicted of first degree robbery of Oliver on November 21, 2000 (count 6), and he pleaded guilty to robbery of an employee of a Blockbuster store on November 2, 2000 (count 11), and robbery of an employee of a Denny's restaurant on October 11, 2000 (count 12). In considering consecutive sentences, the court may rely on facts relating to the crimes, such as whether the "crimes and objectives were predominantly independent of each other," the "crimes involved separate acts of violence or threats of violence," and the "crimes were committed at different times or separate places, rather that being committed so closely in time and place as to indicate a single period of aberrant behavior." (Cal. Rules of Court, rule 4.425(a).) The court may also consider any circumstances in aggravation or mitigation, except any fact used to impose the upper term or to otherwise enhance the sentence, or a fact that is an element of the crime. (*Id.*, rule 4.425(b).)

Again, under *Blakely,* a jury, rather than a sentencing judge, must find any fact, other than the fact of a prior conviction, that increases the punishment for a crime beyond

the "statutory maximum." (*Blakely, supra,* 124 S.Ct. at p. 2537.) When separate offenses are involved, the statutory maximums are separate punishments for each crime. In other words, the court may impose consecutive sentences "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant," as required to comport with *Blakely*. (*Ibid.*, italics omitted.) Because the court cannot make its sentencing selection until the jury has found the defendant guilty beyond a reasonable doubt of two or more offenses, his or her constitutional rights to a jury trial and due process are not violated. (*People v. Sykes, supra,* 120 Cal.App.4th at p. 1345.)

DISPOSITION

The conviction on count 1 for conspiracy to commit kidnapping for robbery is reversed. We remand the matter to the trial court for resentencing, including resentencing on count 6 for first degree robbery in accordance with this opinion and *Blakely*. In all other respects the judgment is affirmed.

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McCONNELL, P. J.

WE CONCUR:

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HALLER, J.

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McDONALD, J.